

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

William James Mathew Wallace II,

Plaintiff,

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Pierce County Sheriff's Department.

Defendant.

CASE NO. 3:19-cv-05329-RBL-DWC

ORDER

Before the Court are three motions filed by Plaintiff: (1) “Motion to Request the Appointment of Counsel” (“Motion to Appoint Counsel”) (Dkt. 25); (2) “Motion to Enter Additional Supporting Evidence re Amended Complaint” (“Motion to Supplement”) (Dkt. 28); and (3) “Motion Seeking Court to Appoint Expert Witness” (“Motion to Appoint Expert Witness”) (Dkt. 28).

21 After review of the Motions and relevant record, Plaintiff's Motion to Appoint Counsel
22 (Dkt. 25) and Motion to Appoint Expert Witness (Dkt. 29) are denied without prejudice. The
23 Court grants Plaintiff's Motion to Supplement (Dkt. 28) and Plaintiff may file a proposed second
24 amended complaint on or before September 3, 2019.

A. Motion to Appoint Counsel (Dkt. 25)

2 Plaintiff requests appointment of counsel. Dkt. 25. No constitutional right to appointed
3 counsel exists in a § 1983 action. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981); *see*
4 *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995) (“[a]ppointment
5 of counsel under this section is discretionary, not mandatory”). However, in “exceptional
6 circumstances,” a district court may appoint counsel for indigent civil litigants pursuant to 28
7 U.S.C. § 1915(e)(1) (formerly 28 U.S.C. § 1915(d)). *Rand v. Roland*, 113 F.3d 1520, 1525 (9th
8 Cir. 1997), *overruled on other grounds*, 154 F.3d 952 (9th Cir. 1998). To decide whether
9 exceptional circumstances exist, the Court must evaluate both “the likelihood of success on the
10 merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity
11 of the legal issues involved.” *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)
12 (*quoting Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). A plaintiff must plead facts
13 showing he has an insufficient grasp of his case or the legal issues involved and an inadequate
14 ability to articulate the factual basis of his claims. *Agyeman v. Corrections Corp. of America*,
15 390 F.3d 1101, 1103 (9th Cir. 2004).

16 Plaintiff contends Defendants have been uncooperative, and he has been transferred
17 several times which has limited access to his records. Dkt. 25 at 1-2. Plaintiff alleges he lacks
18 resources, knowledge, and “other tools to mount a successful argument in trial or even in
19 negotiations.” Dkt. 25 at 10. This case does not involve complex facts or law, and Plaintiff has
20 not shown an inability to articulate the factual basis of his claims in a fashion understandable to
21 the Court. As the Court has screened and declined to serve Plaintiff’s Original Complaint,
22 Plaintiff has also not shown he is likely to succeed on the merits of his case. Accordingly,
23 Plaintiff’s Motion to Appoint Counsel (Dkt. 25) is denied without prejudice.

1 **B. Motion to Supplement (Dkt. 28)**

2 Plaintiff seeks permission to file a supplement to his Amended Complaint. Dkt. 28.

3 Plaintiff states he needs to add evidence to his Amended Complaint which he recently obtained.

4 Dkt. 28 at 2. Plaintiff also appears to include additional factual allegations in his Motion to

5 Supplement. *See* Dkt. 28. Plaintiff has not attached a proposed second amended complaint. *See*

6 Dkt.

7 Here, the Court previously screened Plaintiff's Original Complaint and directed Plaintiff
8 to file an Amended Complaint by August 1, 2019. Dkts. 17, 23, 24. Plaintiff filed his Amended
9 Complaint on July 22, 2019. Dkt. 27. Three days later, on July 25, 2019, Plaintiff moved for the
10 Court to allow him to supplement the Amended Complaint. Dkt. 28. Because Defendants have
11 not yet been served with Plaintiff's Amended Complaint, and because the Court has already
12 provided Plaintiff leave to amend, Plaintiff's Motion to Supplement (Dkt. 28) is granted. Plaintiff
13 may file a proposed second amended complaint on or before September 3, 2019.

14 The proposed second amended complaint must be legibly rewritten or retyped in its
15 entirety, it should be an original and not a copy, it should contain the same case number, and it
16 may not incorporate any part of the Amended Complaint (Dkt. 27) by reference. The proposed
17 second amended complaint will act as a complete substitute for the Amended Complaint, and not
18 as a supplement. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). The Court will
19 screen the proposed second amended complaint to determine if Plaintiff has sufficiently stated a
20 claim for relief under 42 U.S.C. § 1983. *See* 28 U.S.C. § 1915A(a).

21 If Plaintiff fails to file a proposed second amended complaint on or before September 3,
22 2019, this case will proceed on the Amended Complaint (Dkt. 27).

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1 **C. Motion to Appoint Expert Witness (Dkt. 29)**

2 Plaintiff requests the Court appoint his treating orthopedic surgeon to support his claims
3 that Defendants acted with deliberate indifference, failed to make reasonable accommodations,
4 and failed to provide him with access to handicapped showers and a wheelchair. Dkt. 29 at 1-2.
5 Plaintiff argues the expert testimony will assist the Court or jury in “understanding the issue.”
6 Dkt. 29 at 6. In the alternative, Plaintiff argues “the prison officials [should] pay the entire cost
7 of the expert as [he] is indigent” or Plaintiff pay the costs of his expert witness and counsel from
8 any relief. Dkt. 29 at 6.

9 Federal Rule of Evidence 706 allows the court to appoint a neutral expert. *Students of*
10 *Cal. Sch. For the Blind v. Honig*, 736 F.2d 538, 549 (9th Cir. 1984), *vacated on other grounds*,
11 471 U.S. 148 (1985). The determination to appoint an expert rests solely in the court’s discretion
12 and the complexity of the matters to be determined and the need for neutral expert review. *See*
13 *Leford v. Sullivan*, 105 F.3d 354, 358-59 (9th Cir. 1997). “Appointment [of expert witnesses]
14 may be appropriate when ‘scientific, technical, or other specialized knowledge will assist the
15 trier of fact to understand the evidence or decide a fact in issue....’ ” *Levi v. Director of*
16 *Corrections*, 2006 WL 845733 (E.D. Cal. March 31, 2006) (citing *Leford v. Sullivan*, 105 F.3d
17 354, 358–59 (7th Cir. 1997). However, “[r]easonably construed, [Rule 706] does not
18 contemplate the appointment of, and compensation for, an expert to aid one of the parties.”
19 *Walker v. Woodford*, 2008 WL 793413 (S.D. Cal., March 24, 2008) (citation omitted).

20 The issue in this case is whether Defendants acted with deliberate indifference to
21 Plaintiff’s serious medical needs when they determined Plaintiff did not need surgery or certain
22 accommodations. For the most part, it appears Plaintiff requests the appointment of an expert for
23 his benefit alone. Essentially, Plaintiff is requesting the Court appoint an expert to serve as his
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1 advocate and to create a triable issue of fact. This, however, is not the function of a neutral
2 expert witness. *See Spinks v. Lopez*, 2014 WL 411283, at *2 (E.D. Cal. Feb. 3, 2014),
3 subsequently aff'd, 623 F. App'x 499 (9th Cir. 2015) ("The appointment of an expert witness
4 under Rule 706 is intended to benefit the trier of fact, not a particular litigant[.]"). *Bontemps v.*
5 *Lee*, 2013 WL 417790, at *3–4 (E.D. Cal. Jan. 31, 2013); *Gamez v. Gonzalez*, 2010 WL
6 2228427, at *1 (E.D. Cal. Jun. 3, 2010).

7 To the extent Plaintiff's request can be construed as a request for a neutral expert, the
8 facts of this case are not extraordinary, and the legal issues are not complex. *See Sloan v.*
9 *Oakland Police Dep't*, 376 F. App'x 738, 740 (9th Cir. 2010); *Honeycutt v. Snider*, 2011 WL
10 6301429, at *1 (D. Nev. Dec. 16, 2011) ("The appointment of experts in deliberate indifference
11 cases is rare, and such requests should be granted sparingly, particularly given the large volume
12 of cases in which indigent prisoners allege claims under the Eighth Amendment related to
13 medical care, and the substantial expense defendants may have to bear if courts were to appoint
14 experts in such cases."). Accordingly, at this stage of litigation, where the Court has not yet
15 directed service of Plaintiff's Original or Amended Complaint, the Court does not need to
16 appoint a neutral expert. *See e.g. Montanez v. Gonzalez*, 2013 WL 6048132, *1 (E.D. Cal. Nov.
17 14, 2013), *Brooks v. Tate*, 2013 WL 4049043, at *1 (E.D. Cal. Aug. 7, 2013). Accordingly, the
18 Court denies Plaintiff's Motion to Appoint an Expert Witness (Dkt. 29) without prejudice.

19 **D. Conclusion**

20 For the above stated reasons, Plaintiff's Motion to Appoint Counsel (Dkt. 25) and Motion
21 to Appoint Expert Witness (Dkt. 29) are denied without prejudice. Neither counsel nor an expert
22 witness are necessary at this time. The Court grants Plaintiff's Motion to Supplement (Dkt. 28).
23 Plaintiff shall have until September 3, 2019 to file a proposed second amended complaint. The
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1 Clerk is directed to provide Plaintiff with the appropriate forms for filing a 42 U.S.C. § 1983
2 civil rights complaint.

3 Dated this 8th day of August, 2019.

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10 David W. Christel
11 United States Magistrate Judge